

2009

Collier Management & Development Company, Inc. v. Jason R. Fox and Steven R. Fox : Appellant's Opening Brief

Utah Court of Appeals

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Civil No 200 90843-CA

IN THE
Court of Appeals

IN AND FOR
THE STATE OF UTAH

COLLIER MANAGEMENT &
DEVELOPMENT COMPANY, INC., a Utah corporation

Plaintiff and Appellee,

JASON R. FOX and STEVEN R. FOX,

Defendants and Appellants.

AN APPEAL FROM SUMMARY JUDGMENT
IN THE TRIAL COURT

APPELLANTS' OPENING BRIEF

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UTAH APPELLATE COURTS

JUN - 1 2010

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I. STATEMENT OF JURISDICTION.

This court has jurisdiction of this appeal because this is an appeal from a final judgment. Judgment was rendered in the trial court in favor of appellee and against appellants following the granting of appellee's motion for summary judgment.

II. STATEMENT OF ISSUES.

Whether or not the trial court abused its discretion in failing to grant appellants relief from default with respect to their failure to serve and file timely opposition to the summary judgment motion. Appellants contend that the trial court abused its discretion because appellants timely filed their request for relief from default and the trial court failed to act on the request for relief. Appellant Steven Fox claimed under oath that he had never received any of the moving papers on the motion for summary judgment. Appellant Jason Fox stated under oath in his filing with the trial court that the moving papers on the motion were misplaced, and as a result, he was unable to serve and file timely substantive opposition to the motion. Appellants claim that they have substantive defenses to the claims asserted by appellee in its complaint and that triable issues of material fact exist such that summary judgment should be denied. Appellants claim that they have been denied procedural due process by virtue of the trial court's refusal to consider their request for leave to submit substantive opposition to the summary judgment motion because they did not receive due notice of the proceedings referenced in the summary judgment motion. Alternatively, appellants claim that the trial court committed an error of law by denying appellants procedural due process based upon their request for leave to be able to serve and file substantive opposition to the summary judgment motion.

III. STATEMENT OF THE CASE.

Appellee filed a complaint against appellants for recovery on what the appellee claims to be an obligation arising on a promissory note. In addition to naming appellants as defendants, appellee named Marilyn J. Fox, the mother of appellant Jason Fox and the former spouse of appellant Steven Fox, as an additional defendant. However, this action is stayed as to defendant Marilyn J. Fox because of her filing of a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, which bankruptcy case is pending in the United States Bankruptcy Court, Central District of California. This court is already aware of the bankruptcy filing, because the matter was addressed by this court in an order to show cause as to whether or not the entire action should be stayed pending the resolution of the Marilyn Fox bankruptcy case.

Following the service of the complaint, appellants duly filed their answer to the complaint. Appellee then commenced written discovery. Appellants duly served their responses to the written discovery. Appellee thereupon filed a motion for summary judgment. Appellant Steven Fox claims that he was never served with the moving papers on the summary judgment motion. Appellant Jason Fox claims that the summary judgment papers were misplaced. When appellants discovered the pendency of the summary judgment proceedings, they filed with the trial court declarations in which they claimed that they had not been able to serve and file substantive opposition to the summary judgment motion for the reasons stated herein. Appellants' declarations in opposition to the summary judgment motion were served and filed when appellee requested that the summary judgment motion was ready for decision because appellants had failed to timely serve and file substantive opposition to the motion.

The trial court never conducted a hearing on the request of appellants for leave to serve and file substantive opposition, and the court never directly ruled on the declarations submitted by the appellants to the effect that they had not received notice of the summary judgment

proceedings. Instead, the trial court simply entered summary judgment in favor of appellee, and this appeal follows.

IV. STATEMENT OF FACTS.

The complaint alleges that appellants are liable to plaintiff on a promissory note. Appellants contend that there was no debtor/creditor relationship between appellants and appellee and that the relationship, base upon the underlying documents executed by the parties, amounted to a partnership or joint venture for the development of a parcel of real property locate in Idaho. The documentation, prepared by appellee, suggests that a loan was made by appellee to an entity known as Sunrise Oaks Capital Fund, LLC, a Utah limited liability company, which is not a party to this case. The underlying documents show that the Sunrise entity was the principal obligor on any loan, and if the documents are to be construed as loan agreements, the appellants were only secondarily liable as guarantors.

Appellants have learned from discovery undertaken in the Fox bankruptcy case that a secret agreement existed between Collier and Sunrise such that Collier will not look to Sunrise for repayment of the loan. The loan documentation does not call for the waiver of any surety defenses on the part of appellants. Furthermore, appellants have learned through deposition discovery in the Fox bankruptcy case that apparently plaintiff and appellee now owns and controls the Idaho property, and has refused to credit to the loan amount the fair market value of that property. Appellants claim that, even if the documents are construed and found to be a debt instrument obligating appellants on the loan made for the acquisition of the property by appellee in their capacities as alleged guarantors, they are none the less entitled to a credit against any such liability for the fair market value of the Idaho property.

Finally, appellants urge that even if the transaction is construed as a loan, they are not liable to appellee on any debt instrument unless and until appellee exhausts its remedies for collection of the loan against the principal obligor, Sunrise.

Discovery in the Fox bankruptcy case has also uncovered the fact that the principals of appellee Collier and Sunrise are the same and that they maintain the same offices.

If the trial court were to deny the appellants' defense under suretyship law that appellee must proceed first against the principal obligor, Sunrise, appellants are still entitled to contribution over against Sunrise for whatever may be the obligation of appellants to appellee Collier because of Sunrise's liability as principal obligor on the underlying loan.

Simply put, appellants never had the opportunity to raise any of the above facts by way of opposition to the summary judgment motion. At the very least, as a result of the summary judgment, appellee Collier has been unjustly enriched because it now has a judgment against appellants Fox and controls the Idaho property as to which the loan documents provided that appellants were to be granted an option to acquire the entire interest in the Idaho property, without any participation by Collier or Sunrise.

The defenses that appellants raise here on this appeal for purposes of demonstrating how they would have been able to provide substantive defense to the summary judgment motion, are defenses that debtor Marilyn Fox now asserts against Collier and Sunrise in her bankruptcy case. Debtor Marilyn Fox stands in the same position as appellants Jason Fox and Steven Fox with respect to the underlying investment documents. That is, appellee claims that debtor Marilyn Fox was a co-guarantor of the underlying loan that appellee Collier made to Sunrise. In the bankruptcy case, debtor claims that there was no debtor-creditor relationship between the parties, and that the underlying documents should be construed as a joint venture or partnership between

and among appellee, Sunrise, appellants and debtor Marilyn Fox, such that no claim can be asserted by appellee against any alleged guarantor unless and until there is a dissolution, winding up and accounting of the business and financial affairs of the joint venture or partnership. At the least, the value of the Idaho property has to be ascertained and appellants given appropriate credit against any indebtedness found due and owing on the guarantee.

V. ARGUMENT.

This is a simple case where appellants have been denied procedural due process. *Utah Rules of Civil Procedure, Rule 60(b)* provides that, upon motion and on such terms as are just, the court may, upon furtherance of justice, relieve a party or his legal representative from a final judgment, order or proceeding based upon mistake, inadvertence, surprise or excusable neglect; newly discovered evidence; fraud, whether intrinsic or extrinsic, misrepresentation or misconduct of an adverse party; the judgment is void; or any other reason justifying relief from the operation of the judgment.

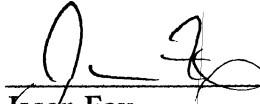
Here, appellants presented such an application in the form of their sworn declarations while the summary judgment proceedings were pending. The trial court denied appellants procedural due process by refusing to rule on their application for relief and refusing, without comment, to grant appellants any relief so as to enable them to submit substantive opposition to the summary judgment motion.

VI. CONCLUSION.

For the forgoing reasons, the judgment should be reversed with direction to the trial court that appellants be given leave to serve and file substantive opposition to the summary judgment


motion, and that appellants have such other and further relief as is just and equitable in the circumstances.

DATED: June 1, 2010



Jason Fox

DATED: June 1, 2010



Steven Fox

PROOF OF SERVICE

I am employed in Salt Lake City, Utah I am over the age of eighteen (18); my business address is as set forth on the cover page of this brief.

On June 1 June 1, 2010, I served the foregoing document described as **APPELLANTS' OPENING BRIEF** on the interested parties in this action

() by placing () the original (!) true copies thereof enclosed in a sealed envelope addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

(!) BY MAIL

I caused such envelope to be deposited in the mail at Salt Lake City, Utah. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postage service on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in the affidavit.

() BY OVERNIGHT DELIVERY

Said document was placed in an envelope designated by the express service center and placed for collection in a box regularly maintained by said carrier with whom I have a direct billing account, to be delivered to the office of the addressee listed above on the next business day.

() BY FACSIMILE TRANSMISSION

I caused such document to be sent via facsimile transmission on this date during regular business hours to the addressee(s) as shown above. The facsimile machine utilized complies with California Rules of Court 2003(3) and no error was reported by the machine. Pursuant to California Rules of Court 2008(4), I caused the machine to print a transmission record of the transmission.

() BY PERSONAL DELIVERY

I caused personal service of the above-referenced document by requesting that an agent or employee of _____ deliver the document(s) to the office of the recipient named above, either by handing the document(s) to the recipient named above, or by leaving the document(s) with the receptionist or other person apparently in charge of the recipient's office.

(X) **STATE** I declare under penalty of perjury under the laws of the State of Utah that the above is true and correct.

() **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

(!) **EXECUTED** on June 1, 2010, at Salt Lake City, California.

JASON FOX
Type or Print Name


Signature

SERVICE LIST

Collier Management v. Jason Fox

Appellate Court Case No. 200 90843-CA

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**IN THE THIRD DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

COLLIER MANAGEMENT &
DEVELOPMENT COMPANY, INC.,

Plaintiff,

vs.

JASON FOX; MARILYN FOX; STEVE
FOX; CHRIS WRIGHT; and NOBLE
HOUSE SERIES C, LLC,

Defendants.

**ORDER OF
SUMMARY JUDGMENT**

Civil No. 080926818

Judge Kate Toomey

Based upon Plaintiff's Motion for Summary Judgment and Memorandum in Support, and Defendants, Jason Fox and Steve Fox's, failure to respond to Plaintiff's Motion, the Court having reviewed the pleadings and papers in file herein, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment is granted.
2. Plaintiff is awarded a judgment against Defendants Jason Fox and Steve Fox as

follows:

- (a) The principal amount of \$750,000.00;
- (b) Accrued interest at the rate of two and one-half percent (2.5%) per month

from December 29, 2007 through June 29, 2008 in the amount of \$14,314.52

(c) Accrued interest at the rate of twenty percent (24%) per annum from June 30, 2008 through the date the Note is paid in full;

(d) Late fees pursuant to the Note in the amount of \$75,000.00;


3. Pursuant to the Promissory Note executed by Defendants Jason Fox and Steve Fox, Plaintiff is awarded a judgment against these Defendants for its court costs and attorney's fees in connection with this action in the amount of \$4,070.00.

4. Post judgment interest shall accrue on the entire judgment amount at the Promissory Note rate of twenty four percent (24%) per annum.

5. This judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or other wise as shall be established by affidavit.

DATED this 9 day of August, 2009.

BY THE COURT:



HONORABLE KATE TOOMEY
District Court Judge